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OPINION	:	No. 12-605
of	:	April 15, 2013
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THE SAN JOSE POLICE OFFICERS' ASSOCIATION has requested leave to sue the CITY OF SAN JOSE in quo warranto on the following question:

Did the City of San Jose fulfill its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits?

CONCLUSION

Leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

ANALYSIS

We are once again asked to consider whether the enactment of a ballot measure addressing public employee pension reform gives rise to an action in quo warranto.[1] In this instance, voters of the City of San Jose (City) recently passed an initiative measure (Measure B) that amended the City's charter to add a new article entitled "The Sustainable Retirement Benefits and Compensation Act."[2] Among other things, Measure B increased retirement contribution levels for current City employees who do not change to an alternative and less expensive retirement plan, and lowered pension benefits and increased retirement contributions and minimum retirement ages for new City employees.

Noting that its peace officer members are City employees whose compensation and benefits are affected by the enactment of Measure B, Proposed Relator the San Jose Police Officers' Association (SJPOA) now seeks our permission to sue the City in quo warranto on the question whether the City sufficiently met and conferred with SJPOA—as it is required to do under the Meyers-Milias-Brown Act (MMBA)[3]—before the City Council voted to place Measure B on the ballot. While the City acknowledges as a general matter that an action in quo warranto may be the appropriate means by which to test whether a given charter amendment was validly enacted, it maintains that we should deny SJPOA's request in this instance because the City bargained with SJPOA to impasse over the contents and terms of Measure B and that no further bargaining was legally required. The City also argues that leave to sue should be denied both on public policy grounds and to avoid a multiplicity of legal actions addressing the validity of Measure B.

The grounds for initiating a quo warranto proceeding are set forth in Code of Civil Procedure section 803, which provides in relevant part:

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[1] *See* 95 Ops.Cal.Atty.Gen. 50 (2012) (quo warranto application submitted by organization representing retired employees of City and County of San Francisco); 95 Ops.Cal.Atty.Gen. 31 (2012) (quo warranto application submitted by Bakersfield Police Officers' Association).

[2] In the presidential primary election held June 5, 2012, Measure B was approved by 69.02 percent of the voters who voted on the question. The final tally was 95,716 voting "Yes," and 42,964 voting "No." City Clerk's Memo. to Mayor and City Council re Certification of the Results of Election held June 5, 2012 (Jul. 26, 2012). *See* http://www.sanjoseca.gov/clerk/Agenda/20120807/20120807_0207.pdf.

[3] Govt. Code §§ 3500-3511.

> An action may be brought by the attorney-general, in the name of the people of this state, upon his [or her] own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

Where, as here, a private party seeks to file an action in quo warranto, that party must obtain the Attorney General's consent to do so.[4] In determining whether to grant an application to file a quo warranto action in superior court, we do not attempt to resolve the merits of the controversy. Rather, we decide whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the public interest.[5] In a proper case, a quo warranto action may be authorized to resolve allegations that a charter city unlawfully exercised its power to amend its charter.[6] For the reasons discussed below, we grant leave to sue.

The California Supreme Court has held that a charter city must comply with the MMBA's meet-and-confer requirements—which govern relations between local public agency employers and local public employee organizations—before placing an initiative measure on the ballot that would affect matters within the scope of the Act.[7] "The MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies."[8] To achieve these purposes, "the MMBA requires governing bodies of local agencies to 'meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of

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[4] *See Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 693-698 (1985).

[5] 95 Ops.Cal.Atty.Gen. at 51; 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 86 Ops.Cal.Atty.Gen. 205, 208-209 (2003).

[6] *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591, 595 & n. 3 (1984); *see City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th 82, 89 (1999); *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; *see also* 95 Ops.Cal.Atty.Gen. at 32; 74 Ops.Cal.Atty.Gen. 77 (1991).

[7] *Seal Beach*, 36 Cal. 3d at 602.

[8] *Id.* at 597; *see* Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara*, 181 Cal. App. 4th 236, 254 (2010).

employment' and to 'consider fully' such presentations made by the employee organizations,"[9] and to do so "prior to arriving at a determination of policy or course of action."[10]

In *Seal Beach*, we granted city employee associations leave to sue the City of Seal Beach in quo warranto after Seal Beach voters passed a ballot initiative that amended the city's charter to require the immediate firing of any city employee who participated in a strike.[11] Before addressing the merits of the controversy, the California Supreme Court observed that using a quo warranto lawsuit to test the regularity of the initiative measure's enactment was "not questioned."[12] And, in a later case, the Court of Appeal held that quo warranto is the *only* legal mechanism for attacking the legitimacy of a charter-amending initiative alleged to have been placed on the ballot in violation of the MMBA.[13]

We now turn our attention to the particular allegations at issue to determine whether a quo warranto suit should be authorized in the present case. First, the parties generally agree that: (1) a quo warranto action may be the appropriate means by which to resolve allegations that a city charter amendment was improperly enacted; (2) the City was required to comply with the MMBA's collective bargaining requirements before placing an initiative measure on the ballot that would affect represented employees' wages, hours and other conditions of employment; and (3) Measure B was in fact such a measure. The parties differ, however, in that the SJPOA contends that the City did not fulfill its bargaining obligations under the MMBA before it placed Measure B on the ballot, while the City counters that it was not legally required to do any further bargaining on the issue because the parties had reached an impasse in their discussions and negotiations.

Examining this dispute in more detail, it is clear from the parties' submissions and recitations of the relevant facts that the parties did in fact meet and/or exchange proposals

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[9] *Seal Beach*, 36 Cal. 3d at 596 (quoting Govt. Code § 3505); *see Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rel. Bd.*, 35 Cal. 4th 1072, 1083 (2005); *Intl. Assn. of Firefighters Local Union 230 v. City of San Jose*, 195 Cal. App. 4th 1179, 1186 (2011).

[10] Govt. Code § 3505.

[11] *See Seal Beach*, 36 Cal. 3d at 595.

[12] *Id.* at 595 & n. 3.

[13] *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; *see also City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th at 89.

on numerous occasions in 2011 and early 2012 regarding the terms of both a successor Memorandum of Understanding (or MOU) that would cover SJPOA members and the potential ballot initiative that would become Measure B. The City, however, contends that its MMBA obligations to meet and confer with SJPOA over the ballot measure ended on October 31, 2011, when, according to a June 2011 agreed-upon "framework" to its negotiations with SJPOA, the parties agreed to "utilize impasse resolution procedures . . . if the parties failed to reach agreement by [that date]." Since no agreement was reached by that date, the City maintains, no further bargaining was required under the MMBA or otherwise.

It is undisputed, however, that additional contact between the parties occurred during the time frame from October 31, 2011, through March 6, 2012, when the City Council voted to place Measure B on the June 2012 ballot. There were unsuccessful attempts at mediation; the SJPOA submitted proposals that it characterizes as "concessionary," but which the City contends were insufficient to break the impasse; and the City disseminated revised versions of the proposed ballot measure, which it says were designed to facilitate mediation (as opposed to negotiation, which it continued to maintain had reached an impasse as of October 31, 2011), but which the SJPOA argues were unilateral steps affecting its members' rights without a meaningful opportunity to bargain or negotiate.

Essentially, the City asserts that it had no further duty to bargain under the MMBA after October 31, 2011, and that nothing that occurred after that date ever revived such a duty. But the SJPOA maintains that its agreement to the above-referenced framework for negotiations was not an agreement to "prospectively stipulate" to an immutable state of impasse effective October 31, 2011, and that, in any event, the parties' subsequent proposals broke any ostensible impasse. In particular, the SJPOA complains that it had no opportunity to bargain with the City with regard to the revised versions of Measure B that the City disseminated, including the final version that was placed before the voters.

On the one hand, the MMBA's "duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse . . . ."[14] On the other, an impasse may be broken, and the duty to bargain revived, by a change in circumstances that suggests that bargaining may no longer be futile.[15] In these

[14] *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Relations Bd.*, 35 Cal. 4th 1072, 1083 (2005) (quoting *Santa Clara Co. Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 537 (1994)).

[15] *See Pub. Empl. Rel. Bd. v. Modesto City Sch. Dist.*, 136 Cal. App. 3d 881, 899 (1982).

circumstances, then, was it reasonable, and in compliance with the MMBA, for the City to insist that negotiations reached an impasse on October 31, 2011, and that such an impasse was never broken, despite additional proposals from both parties? Was it reasonable for the SJPOA, having agreed at the outset of negotiations to utilize impasse resolution procedures if an agreement was not reached by October 31, 2011, to have any expectation that the City's duty to negotiate under the MMBA would continue after that date? Assuming the validity of declaring negotiations at an impasse, effective October 31, 2011, did any changed circumstances revive the duty to negotiate? In deciding whether a suit in quo warranto should be permitted to proceed, it is not our province to conclusively answer questions such as these, but only to determine whether such questions present substantial factual and legal issues and whether a suit in quo warranto is the proper forum in which to resolve them. We find this to be the case here.

Also at issue, we think, and interwoven with the question whether the parties' positions and actions were reasonable under the circumstances, is the parties' respective good faith toward the negotiations, the evaluation of which will depend on "primarily a factual determination based on the totality of the circumstances."[16] We are not equipped (and it is not our role) to make such a determination at this juncture, but we find that a quo warranto proceeding will afford the parties an adequate opportunity to establish the validity of their positions before a neutral factfinder. Additionally, we find that resolving the question whether Measure B was validly enacted—in compliance with the MMBA's meet-and-confer requirements—is in the public interest.

In closing, we briefly address the City's contentions that leave to sue should be denied because (1) allowing the suit to proceed would in some sense punish the City for making what it views as concessionary proposals and therefore runs counter to a public policy that would encourage such concessions; and (2) other court proceedings and matters brought before the state Public Employment Relations Board (PERB) involve similar issues and allegations, and permitting this action will therefore result in a counterproductive multiplicity of proceedings. First, we have not adjudicated the merits of this dispute and express no view on whether a court will ultimately determine that, because of its own subsequent actions or other factors, the City had a duty to bargain with the SJPOA after it declared an impasse; thus, we have no occasion to consider a public policy argument such as the one articulated here, which is better addressed to the court that will address the merits. Second, we have reviewed the materials submitted to us concerning the other complaints and legal disputes involving Measure B, but those matters involve different complaining parties[17] and/or different legal questions. Under the

[16] *Placentia Fire Fighters v. City of Placentia*, 57 Cal. App. 3d 9, 25 (1976) (internal citation omitted); *see* 95 Ops.Cal.Atty.Gen. at 36.

[17] PERB's jurisdiction over MMBA-related disputes involving local public employee

circumstances, we believe that the separate proceedings fail to present an adequate opportunity for these two parties to air their respective and opposing positions regarding the present MMBA-related dispute and have that dispute resolved.

Accordingly, leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

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organizations does not extend to peace officer organizations, like the SJPOA. *See* Govt. Code §§ 3509, 3511.